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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

In re)	Case No. 11-31376 DM
)	Chapter 11
HOWREY LLP,)	Hon. Dennis Montali
)	
Debtor.)	CHAPTER 11 TRUSTEE'S MOTION
)	FOR ENTRY OF ORDER
)	APPROVING SETTLEMENT WITH
)	THE DCMB PARTNERS

1 TO THE HONORABLE DENNIS MONTALI, UNITED STATES BANKRUPTCY JUDGE:

2 Allan B. Diamond, the chapter 11 trustee ("Trustee") of the Estate of Howrey LLP
3 ("Howrey" or "Debtor"), hereby submits this motion ("Motion") pursuant to Federal Rule of
4 Bankruptcy Procedure 9019(a) for entry of an order approving a settlement between the Debtor
5 and Lloyd R. Day, Jr., James R. Batchelder, Robert M. Galvin, Paul S. Grewal, Renee DuBord
6 Brown, and Jackie N. Nakamura, (the "DCMB Partners"). This settlement (if approved) will
7 resolve the Clawback Claims and the Tax Claims between the Trustee and the DCMB Partners
8 through two paths: litigation and payment and is well within the Trustee's business judgment.
9 In support of this Motion, the Trustee represents as follows:

10 **JURISDICTION**

11 1. The Court has jurisdiction pursuant to 28 U.S.C. §§ 1334(a) and (b). This is a
12 core proceeding pursuant to 28 U.S.C. § 157(b) (2).

13 **BACKGROUND**

14 2. In the fall of 2009, Howrey merged with a California law firm known as Day
15 Casebeer Madrid & Batchelder LLP ("DCMB") under the terms of a Business Combination
16 Agreement ("BCA"). Pursuant to the BCA, the DCMB Partners joined Howrey. Of the DCMB
17 Partners, seven joined as Level II partners at Howrey; only two joined Howrey as Level I
18 partners.

19 3. On April 11, 2011, certain creditors of Howrey filed a chapter 7 involuntary
20 petition against the Debtor. On June 6, 2011, the Court entered an order converting the above
21 captioned case to a case under chapter 11 of the Bankruptcy Code.

22 4. On September 22, 2011, the Court entered an order granting a motion to appoint a
23 chapter 11 trustee. On October 7, 2011, the U.S. Trustee for the Northern District of California
24

1 appointed the Trustee as chapter 11 trustee for the Estate of Howrey. On October 12, 2011, the
2 Court entered an order approving the appointment of the Trustee.

3 5. Since his appointment, the Trustee and his counsel have identified claims against
4 various former Howrey partners (including the DCMB Partners) to recoup compensation each
5 had received while Howrey was insolvent and/or unprofitable under various causes of action
6 such as fraudulent transfers under the Bankruptcy Code and breach of contract (the “Clawback
7 Claims”).

8 6. In the summer of 2013, some of the DCMB Partners raised with the Trustee’s
9 counsel an issue unique to them: whether, under the BCA, the DCMB Partners are a special
10 class of fixed income partners at Howrey. If true, this contention would have two practical
11 effects. First, the DCMB Partners would likely owe the Estate very little (if anything) on the
12 Clawback Claims because any compensation they received would have been guaranteed by
13 contract. Second, the DCMB Partners would be exempt from allocations of Howrey’s income –
14 particularly the contingent fee income it obtained after dissolution – on the firm’s federal income
15 tax returns (the “Tax Claims”).

16 7. Certain of the DCMB Partners filed a request for status conference on this issue,
17 and the Trustee filed a limited opposition. The Court granted the DCMB Partners’ request for
18 status conference and appointed Judge Thomas A. Carlson (Bankr. N.D. Cal.) to serve as
19 mediator between the parties.

20 8. The Parties mediated their dispute in August 2013, at which time an agreement
21 was reached in principle. Since the mediation, the Parties have worked to memorialize the terms
22 of the settlement in a written agreement. The terms of the agreement became final in mid-
23 December 2013 and a true and correct copy of the settlement agreement (the “DCMB
24

1 Settlement”) is attached hereto as **Exhibit A**. As discussed below and in his Declaration
2 attached as **Exhibit B**, the Trustee has determined that the proposed settlement is well within the
3 range of reasonableness and in the best interests of the Estate. *See* Diamond Decl. ¶¶ 1-17. By
4 this Motion, the Trustee, therefore, requests that the Court approve the DCMB Settlement and
5 grant the other requested relief so the bankruptcy Estate can reap the benefits of this compromise

6 **TERMS OF PROPOSED DCMB SETTLEMENT**

7 9. The DCMB Settlement aims to resolve the Clawback Claims and the Tax Claims
8 through two paths: litigation and payment. If certain of the DCMB Partners do not wish to
9 litigate the Tax Claims with the Estate, those partners must immediately pay the Estate. If some
10 of the DCMB Partners do wish to litigate the Tax Claims with the Estate, the amount those
11 partners pay the Estate is contingent upon the outcome of the Tax Claims litigation: If the
12 DCMB Partners litigate and win, those partners pay nothing on the Clawback Claims, but if
13 those partners lose, they pay the Estate 14% of the total value of the Clawback Claims
14 (calculated as all monies received between the Second Quarter of 2010 and the First Quarter of
15 2011).

16 10. The DCMB Settlement also limits the scope of any litigation of the Tax Claims.
17 The DCMB Partners will file a Complaint with the Bankruptcy Court seeking declaratory relief
18 that is agreed upon by the DCMB Partners and the Trustee, the parties will take no discovery,
19 and the parties will file summary judgment motions on the Complaint. Further, the parties have
20 waived their right to appeal any final judgment and order entered by the Bankruptcy Court on the
21 summary judgment motions. This outcome greatly benefits the Estate because it reduces the
22 amount of money the Estate would have to spend to litigate the Tax Claims.

1 11. As for the terms of payment, the DCMB Partners who choose to litigate will pay
2 the Trustee 14% of the Clawback Claims if they lose, which, while lower than many of the
3 settlements the Estate has already obtained, is justified by the unique facts and circumstances
4 related to the DCMB Partners and the non-monetary terms of the settlement reached with them –
5 namely, that by agreeing to a streamlined process involving an agreed declaratory judgment
6 complaint mandating no discovery, presentation of the issues to the Bankruptcy Court and no
7 appeal, the Estate will be saving significant litigation related costs than if the issues were
8 litigated in the more expansive, traditional setting applying all of the rules of evidence, civil and
9 potentially appellate procedure.

10 12. Further, some of the DCMB Partners have adduced evidence of a hardship to pay
11 the Estate, and have provided that information to the Trustee confidentially. For those hardship
12 cases, the Trustee has accepted a lower payment in order to reflect the realities of the situation
13 and difficulties of collecting more from these individuals.

14 **BASIS FOR RELIEF AND APPLICABLE AUTHORITY**

15 13. By this Motion, the Trustee respectfully seeks the entry of an order pursuant to
16 section 105(a) of the Bankruptcy Code and Bankruptcy Rule 9019(a) approving the DCMB
17 Settlement. As discussed in further detail below, the DCMB Settlement provides a fair and
18 equitable resolution of the Parties' disputes and is in the best interests of the Howrey Estate.

19 14. Bankruptcy Rule 9019(a) provides, in part, that "[o]n motion by the trustee and
20 after notice and a hearing, the court may approve a compromise or settlement." FED. R. BANKR.
21 P. 9019(a). The Rule empowers bankruptcy courts to approve compromises and settlements that
22 are "fair and equitable" and "in the best interest of the Estate." *Martin v. Kane (In re A & C*
23 *Properties)*, 784 F.2d 1377, 1381 (9th Cir. 1986), *cert. denied sub nom. Martin v. Robinson*, 479
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1 U.S. 854 (1986). “The bankruptcy court has ‘great latitude’ in approving compromise
2 agreements.” *Woodson v. Fireman’s Insurance, Co. (In re Woodson)*, 839 F.2d 610, 620 (9th Cir.
3 1988).

4 15. To evaluate a compromise, a bankruptcy court considers “(a) [t]he probability of
5 success in the litigation; (b) the difficulties, if any, to be encountered in the matter of collection;
6 (c) the complexity of the litigation involved, and the expense, inconvenience and delay
7 necessarily attending it; [and] (d) the paramount interest of the creditors and a proper deference
8 to their reasonable views in the premises.” *In re A & C Properties*, 784 F.3d at 1381.

9 16. In addition to the four prong test set forth in *A & C Properties*, it is also well
10 established that “the law favors compromise and not litigation for its own sake.” *See Port*
11 *O’Call Investment Co. v. Blair (In re Blair)*, 538 F.2d 849, 851 (9th Cir. 1976).

12 17. Although the Trustee, as the proponent of the settlement, bears the burden of
13 persuasion (*see id.*), “a court generally gives deference to a trustee’s business judgment in
14 deciding whether to settle a matter,” *In re Mickey Thompson, Entertainment Group, Inc.*, 292
15 B.R. 415, 420 (B.A.P. 9th Cir. 2003).

16 18. As discussed below and in his Declaration, the Trustee has determined in the
17 exercise of his reasonable business judgment that the proposed DCMB Settlement is fair and
18 reasonable within the standards discussed above, and that it is in the best interests of the Howrey
19 Estate. *See* Diamond Decl. ¶ 17.

20 19. Here, there is no question that the DCMB Settlement satisfies the *A&C Properties*
21 factors.

22 20. **Factor #1: Probability of Success in the Litigation.** Although the Trustee is
23 confident the Estate will prevail on the litigation of the Tax Claims, full-blown tax litigation
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25

1 would be costly to the Estate with little to no benefit to creditors, and even prevailing on the Tax
2 Claims would still require the Estate to litigate fully the Clawback Claims against the DCMB
3 Partners. Given the risks of litigating the Clawback Claims (including, without limitation, the
4 difficulties associated with proving Howrey's insolvency, lack of reasonably equivalent value,
5 and other factors), the Trustee believes that settling with the DCMB Partners at a level somewhat
6 lower than prior partner settlements is justified.

7 **21. Factor #2: The Difficulties to be Encountered in Collection.** Here, the
8 collection issue is whether the Estate could collect on a clawback judgment against the DCMB
9 Partners. As with any litigation against individuals, some partners may have sufficient assets to
10 pay the judgment; others may not have assets that are subject to judgment under state law and
11 sufficient to pay the full amount of the Clawback Claims. Moreover, as discussed above, certain
12 of the DCMB Partners have a hardship (such as confidential medical issues, change in nature of
13 employment, etc.) which would present a substantial difficulty in collecting a full judgment of
14 the Clawback Claims from them. Thus, the Trustee believes the DCMB Settlement satisfies the
15 second *A&C Properties* factor.

16 **22. Factor #3: The Complexity of the Litigation Involved and its Expense,**
17 **Inconvenience and Delay.** This factor overwhelmingly supports the settlement. Not only
18 would the clawback litigation be expensive and inconvenient, but the tax litigation would be the
19 worst of all possible worlds. Protracted litigation, for which tax counsel would be necessary,
20 would be costly with little to no benefit to the Estate. This, of course, is in addition to any cost
21 related to litigating the Clawback Claims on their merits, which itself could be costly and
22 lengthy. Lastly, this settlement embodies a litigation procedure that streamlines in a very
23 substantial manner what otherwise would be a very costly litigation alternative. This procedure,
24
25

1 moreover, eliminates what otherwise could result in costly, protracted appeals enduring for years
2 without final resolution for the Estate. The Trustee therefore believes it is beyond doubt that the
3 DCMB Settlement satisfies the third *A&C Properties* factor.

4 23. **Factor #4: The Paramount Interest of the Creditors.** Finally, the DCMB
5 Settlement is in the best interests of all creditors. In the short-term, the DCMB Settlement
6 permits the Estate to collect some money and create framework to resolve tax issue without
7 substantial costs to the Estate. Accordingly, the DCMB Settlement meets the fourth and final
8 *A&C Properties* factor.

9 24. In summary, because the proposed settlements satisfy all of the *A & C Properties*
10 factors, the Trustee has concluded in his business judgment that the DCMB Settlement is fair,
11 equitable, and in the best interest of the Estate, and should be approved by the Court. *See*
12 *Diamond Decl.* ¶ 17.

13 CONCLUSION

14 For the foregoing reasons, the Trustee respectfully requests that the Court grant the
15 Motion and enter and order approving the Debtor's compromise with the DCMB Partners as
16 described above.

1 Dated: January 14, 2014

2 /s/ Andrew B. Ryan

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1 **NOTICE OF SERVICE**

2 X (CM/ECF) The document was electronically served on the parties to this action via the
3 mandatory United States Bankruptcy Court of California CM/ECF system upon filing of above
described document:

4 **SEE ATTACHED SERVICE LIST**

5 X (ELECTRONIC MAIL SERVICE) By electronic mail (e-mail) the above listed
6 document(s) without error to the email address(es) set forth below on this date:

7 **SEE ATTACHED SERVICE LIST**

8 X (UNITED STATES MAIL) By depositing a copy of the above-referenced documents for
mailing in the United States Mail, first class postage prepaid, at Houston, Texas, to the parties
9 listed, at their last known mailing addresses, on this date:

10 **SEE ATTACHED SERVICE LIST**

11 (OVERNIGHT COURIER) By depositing a true and correct copy of the above
referenced document for overnight delivery via Federal Express, at a collection facility
12 maintained for such purpose, addressed to the parties on the attached service list, at their last
known delivery address, on the date above written.

13 (COURIER SERVICE) By providing true and correct copies of the above referenced
documents [with copies of the supporting detailed invoices/attorney time records for the Final
14 Fee Application] via courier delivery, to the following on or about _____:

15 (FACSIMILE) That I served a true and correct copy of the above-referenced document via
16 facsimile, to the facsimile numbers indicated, to those people listed on the attached service list,
on the date above written.

17
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